86-433

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

JULIE D. KNOWLES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

As a result of the jury's answers to two written interrogatories, the jury returned with a general verdict for Petitioner. Invoking F.R. Civ. P. 59(e), the trial judge (federal magistrate) reversed that general verdict favoring the Petitioner and gave judgment to Respondent. The Questions presented are:

1. Whether the Federal magistrate violated the Seventh Amendment — right to trial by jury in civil cases — by reversing a jury verdict favoring Petitioner after he determined (a) that Respondent was surprised by a particular factual issue and therefore (b) such issue should not have been submitted to the jury.

2. Whether the Federal Magistrate, in an effort to correct what he perceived to be error in his jury instruction, violated the Federal Rules of Civil Procedure in utilizing Rule 59(e) — Motion to Alter or Amend a Judgment — to reverse a jury verdict favoring Petitioner.

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

A list of all corporations affiliated with the Petitioner is found in the Appendix p. 19a *infra*.

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v.

JULIE D. KNOWLES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Mutual Life Insurance Company of New York, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on April 23, 1986. Rehearing was denied July 14, 1986.

OPINIONS BELOW

The *per curiam* Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 788 F.2d 1038 and reprinted in the appendix p. 1a, *infra*. An Application of the Petitioner for a Rehearing was denied by Order, dated July 14, 1986.

The Memorandum decision of the United States District Court for the District of Maryland (Goetz, Federal magistrate) dated February 14, 1985, is unreported and reprinted in the appendix (p. 8a *infra*).

JURISDICTION

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

AMENDMENT VII

[Trial by Jury in Civil Cases]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULES INVOLVED

RULE 50(b)

Motion for Judgment Notwithstanding the Verdict

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of the judgment, a party who has moved for a

directed verdict may move to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

* * * * * *

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

Respondent, the beneficiary of a $200,000 term life insurance policy, brought this action to recover the proceeds of the policy. Jurisdiction was based on Title 28 U.S.C. § 1332. The case was referred to a United States Magistrate for trial pursuant to 28 U.S.C. § 636(c).

This Petition is grounded upon the trial court's decision to invoke F.R. Civ. P. 59(e) to reverse a jury verdict and thereby deprive Petitioner of its right to a jury trial on one

of two crucial factual issues submitted to the jury for a written finding. That one issue was decided in Petitioner's favor resulting in a general verdict for Petitioner. After the verdict, the Magistrate determined that he should not have submitted that issue to the jury. Upon appeal, the Fourth Circuit determined that a reversal of a jury verdict under Rule 59(e) was within the discretion of the trial judge.

Substantive Facts

On May 28, 1980, one Charles Spell, an insurance policy applicant, gave the Petitioner's agent an initial premium check postdated to June 7, 1980. In return, the agent delivered a policy which contained standard language acknowledging receipt of the check. Mr. Spell accepted the policy and the agent delivered it conditioned upon the agent obtaining a letter from Petitioner's home office affirming that Mr. Spell could benefit from conversion rights (i.e. the right to convert the insurance from term to life keeping his initial insurance age) if he purchased the policy. This condition did not occur prior to Mr. Spell's death on May 31, 1980. Because of Spell's death and insufficiency of funds to pay the premium, the initial premium due was never paid.

Procedural Facts

On the day following the conclusion of testimony, Respondent moved that evidence of Spell's conditional acceptance of the policy be stricken from the case. She claimed that she was "surprised" by Petitioner's evidence on that issue because it had not been specifically identified in answers to interrogatories or in the pre-trial order. The magistrate denied the motion and submitted the issue of conditional acceptance to the jury.

Two written interrogatories were submitted and a general verdict was requested pursuant to F.R. Civ. P. 49(b). As completed by the jury, the interrogatories were as follows:

SPECIAL INTERROGATORIES TO THE JURY

1. Based on the evidence in this case did David Fleming have apparent authority to deliver the policy in question in this case to Charles Spell on May 29, 1980 in return for a postdated check?

Yes X No ___

If your answer to Question No. 1 is No, your inquiry has ended and you must find for the defendant.

If your answer to Question No. 1 is Yes, then answer Question No. 2.

2. Did Charles Spell place a condition upon his acceptance of the policy that he receive a letter from the company authorizing him to convert the policy to whole life?

Yes X No ___

If your answer to Question No. 2 is Yes, your inquiry has ended and you must find for the defendant.

If your answer to Question No. 1 is Yes and Question No. 2 is No., then you must find for the plaintiff.

Based upon the answers to the foregoing interrogatories, the jury finds in favor of the Defendant
(insert Plaintiff or Defendant)

Date January 10, 1985 Patricia McSwain
Forelady

Following the jury verdict for Petitioner, Respondent filed motions requesting a judgment n.o.v. under Rule 50(b), a new trial under Rule 59, and relief from judgment

under Rule 60(b). By memorandum opinion dated February 14, 1985, the Magistrate converted the Rule 60(b) motion to a Rule 59(e) motion as a device to vacate the answer to written interrogatory #2, leaving the answer to written interrogatory #1. The Magistrate then entered a general verdict for Respondent. No mention was made of either Rule 59(a), on which Respondent apparently relied in her post-trial motion, or Rule 50(b).

The basis for the reversal of the jury verdict was that the Magistrate perceived that Respondent was surprised by the conditional acceptance defense and thus the factual issue should not have been submitted to the jury.

Petitioner appealed this decision. The Fourth Circuit ruled that a trial court has discretion under Rule 59(e) to reverse a jury verdict.

Because the use of Rule 59(e) to reverse a jury verdict was improper under its own terms and denied Petitioner its right to a jury verdict on the conditional acceptance issue in violation of the Seventh Amendment, Petitioner requests summary reversal and remand for new trial.

REASONS FOR GRANTING THE WRIT

IT IS NECESSARY THAT THIS COURT AFFIRM THAT A FEDERAL MAGISTRATE DOES NOT HAVE DISCRETIONARY AUTHORITY TO INVOKE RULE 59(e) EITHER TO (1) REVERSE A JURY VERDICT OR (2) DEPRIVE A PARTY OF ITS RIGHT TO A JURY TRIAL GUARANTEED BY THE SEVENTH AMENDMENT OF THE U.S. CONSTITUTION

Introduction

The Magistrate determined that F.R. Civ. P. 59(e) empowered him to reverse a jury verdict on a critical issue of fact. Petitioner introduced substantial evidence at trial to show that the policy of insurance was conditionally accepted. That issue was submitted to the jury. After due consideration, the jury decided the issue and rendered a

verdict in favor of the Petitioner. On the insistence of Respondent that the verdict was in error, the Magistrate vacated both the jury's finding on this issue and the verdict favoring Petitioner. He then rendered judgment in favor of Respondent. This result constituted a violation of the Seventh Amendment whose guarantee of a trial by jury demands a new trial under these circumstances. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 380, 397-8 (1913); *National Car Rental Systems, Inc. v. Beiter Monkey Grip Co.*, 511 F.2d 724, 730 (5th Cir. 1975), *cert. denied*, 423 U.S. 894 (1975) and 423 U.S. 986 (1975); *Garrison v. United States*, 62 F.2d 41, 42 (4th Cir. 1932). This result was also contrary to the meaning and purpose of Rule 59(e).

The Magistrate's decision and the affirmance by the Fourth Circuit conflict in principle with established authority dealing with the subject of the right to jury trial.

To avoid allowing these constitutional and rule infringements to become precedent, this Court should re-confirm that only Rule 50(b) provides the mechanism by which a jury verdict can be reversed. Further, this Court should re-confirm that if a trial judge chooses to disregard a verdict of the jury for a reason other than that which satisfies Rule 50(b), then the trial judge must follow the authority of Rule 59(a) which grants the litigants a new trial. In the instant case, Magistrate Goetz disregarded a jury verdict reasoning that it was based upon improperly admitted "surprise evidence." Petitioner denies that Respondent was unfairly surprised by the evidence. In any event, the only remedy for such occurrence is a new trial under Rule 59(a).

RULE 50(b)

First with respect to Rule 50(b) which allows a reversal of a jury verdict, the standard is:

> "[W]hether the evidence is such that, without weighing the credibility of witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached."

9 Wright & Miller, *Federal Practice and Procedure* § 2524 pp. 545-6 (1971). When this standard is met, the constitutional right to a jury trial is not impinged upon because the issue is one of law only. When this standard is ignored, and the verdict of the jury is reversed, the province of the jury to decide an issue of fact is invaded in violation of the Constitution. *Garrison v. United States, supra* at 42. Neither the trial court nor the Fourth Circuit found that the Rule 50(b) standard was met in this case. The standard could not have been met because, undisputedly, there was substantial evidence to support the verdict.

The effect of the lower courts' disregard of the Rule 50(b) standard was to declare that a jury verdict could be reversed under any standard that the trial judge in his discretion believes ought to apply. This decision is unprecedented and departs from the common law. As such, it abrogates the Seventh Amendment's right to a jury trial.

Further, in its capacity as the ultimate interpreter of the Federal Rules of Civil Procedure, *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964), this Court should declare that the Federal Rules did establish in Rule 50(b) the only two alternatives available to the judge who chooses to vacate a judgment *after* the jury returns with its verdict.

F.R. Civ. P. 50(b) states: "If a verdict was returned, the court may allow the judgment to stand or may reopen the

judgment and either *order a new trial or direct the entry of judgment,* as if the requested verdict had been directed." Rule 50(b) (Emphasis supplied). Thus, only rules 50(b) and 59(a) can be invoked after the jury verdict. This principle is not changed by the submission to the jury — as in this case — of written interrogatories with instructions to render a general verdict under Rule 49:

> When jury trial is of right, it is the verdict of the jury, whether a general verdict or a verdict under either of the procedures of Rule 49, that is the definitive finding of fact, and a motion to set aside such a verdict, or a part of it, must be a motion for judgment notwithstanding the verdict or a motion for new trial, or both, under Rules 50 and 59.

9 *Wright & Miller, supra,* § 2513 at 532-3.

RULE 59(a)

As indicated, because Magistrate Goetz did not rely on Rule 50(b) the jury verdict in this case could then be nullified only by reliance on Rule 59(a). If some irregularity led to the jury verdict, as Magistrate Goetz perceived, then the sole remedy would be to disregard the jury's verdict and allow a retrial.

The basis for this principle lies in the common law. The Seventh Amendment provides that if the common law establishes grounds for a new trial, that is the only form of re-examination permitted today when those same grounds are found to exist. Citing precedent from the common law, the Fourth Circuit in the frequently-cited case of *Aetna Surety Co. v. Yeatts,* 122 F.2d 350, 354 (4th Cir. 1941) addressed the sole means available at common law to deal with the precise issue of a claim of surprise after the verdict has been rendered.[1]

[1] During the trial and before a verdict is rendered the proper remedy in the event of surprise is a continuance. 6A Moore's Federal Practice ¶59.08[2], at 59-96; *Conway v. Chemical Leaman Truck Lines, Inc.,* 687 F.2d 108, 112 (5th Cir. 1982). Respondent did not request a continuance.

> The parties may be *surprised* by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If *unjust* verdicts obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely *necessary to justice*, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial.

Id. at 354 (Emphasis in original). Accord, *Conway v. Chemical Leaman Tank Lines, Inc.*, 687 F.2d 108 (5th Cir. 1982) (a case very similar procedurally to the instant case); 11 Wright and Miller, *supra*, § 2805 at 38 (1973 ed.).

Thus, in reversing the jury verdict the Magistrate ignored the only remedy available at common law and in effect re-examined the "surprise" evidence in determining that it was unsuitable for submission to the jury. Lacking a common law basis, this ruling thereby deprived Petitioner of its constitutional right to a jury trial on a crucial factual issue.

Finally, Petitioner's position that a new trial is required under the particular circumstances of this case, is confirmed by Professor Moore. Included in the "catalog" of irregularities remedied only by a new trial are the two "judicial errors" found to exist in this case:

> . . . permitting a party, over timely objection,[2] to present a claim or defense going beyond the issues as framed at the pre-trial conference or in the pleadings, where the objecting party is actually surprised and prejudiced; the improper submission or withdrawal of a material issue from the jury.

6A Moore's *Federal Practice* ¶59.08[1], at 59-81.

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[2] In this case, the objection was untimely because it followed the conclusion of the testimony.

RULE 59(e)

To support his reversal of the jury verdict, the Magistrate sought out and then applied Rule 59(e). The authority he utilized for his ruling consisted of two cases (App. 18a), both non-jury, which permit a judgment to be vacated under Rule 59(e).[3] The Magistrate equated vacating a judgment with reversing a jury verdict. In fact, if Rule 50(b) is not invoked, vacating a jury verdict consists of setting aside the verdict preliminary to granting a new trial.

> The motion to set aside the verdict *and grant a new trial* was a matter of federal procedure governed by Rule . . . 59 . . . On such a motion it is the duty of the judge to set aside the verdict *and grant a new trial*, if he is of the opinion that the verdict . . . will result in a miscarriage of justice, . . .

Aetna Casualty and Surety Co. v. Yeatts, supra, 122 F.2d at 352. (Emphasis supplied). Accord, *Slocum v. New York Life, Ins. Co., supra,* 228 U.S. at 380. The restriction against vacating the judgment without granting a new trial is found in the Seventh Amendment.

> And while the Seventh Amendment does not preclude the rendition of a judgment n.o.v., where the motion for directed verdict could have been properly sustained, *it does stand in the way of court alteration or amendment of a verdict or a judgment which is based upon a jury verdict.*

6A Moore's *Federal Practice* ¶59.04[2] at 59-17 (Emphasis supplied).

It is the restriction of the Seventh Amendment to common law precedent that precludes the use of Rule 59(e) in this case. In *Dimick v. Schiedt,* 293 U.S. 474, 476

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[3] The Fourth Circuit relied on *Dove v. Codesco,* 569 F.2d 807 (4th Cir. 1978) which is also a non-jury case permitting a Rule 60(b) motion to be converted to Rule 59(e).

(1935), as part of a lengthy discourse on the motion for new trial, this Court said

> In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.

We have shown in the previous section that surprise and erroneous instructions required a new trial at common law. Rule 59(e) standards, whatever they may be, could not comply with this prerequisite of common law pedigree because Rule 59(e) was enacted, not to codify the common law, but to take care of the situation that arose in *Boaz v. Mutual Life Insurance Co. of New York*, 146 F.2d 321 (8th Cir. 1944) in which the trial judge wished to change his own ruling prior to verdict and after he had discharged the jury. Thus, lacking both common law lineage and legislative intent to change the common law, Rule 59(e) cannot be used either as a vehicle for reversal of a jury verdict or a grant of a new trial.

The full impact of the ruling of Magistrate Goetz and the constitutional violation that occurred is highlighted by Professor Moore's listing the various situations in which the Seventh Amendment permits a party to be deprived of a jury verdict: (1) Issues arising in equity, (2) Use of a master's report as evidence, (3) Summary judgment, (4) Employment of Rule 49 rules, (5) Directed verdict, (6) Judgment n.o.v. under Rule 50(b) and (7) A new trial under Rule 59(a). 5 Moore's *Federal Practice* ¶38.11[3] at 38-74-5. Thus, the limited role of Rule 59(e) is clear: it "deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50(b)." 6A Moore's *Federal Practice* ¶59.01[6] at 59-7. There can be no doubt that the error in this case is Magistrate Goetz's equating Rule 59(e) with Rule 50(b).

CONCLUSION

In this case, a Federal Magistrate deprived the Petitioner of a jury trial. He substituted a jury verdict in favor of the Defendant insurance company (Petitioner) with his verdict in favor of the Plaintiff (Respondent). In doing so, he violated the Petitioner's constitutional right to a jury trial and also the provisions of the Federal Rules of Civil Procedure. As stated above, if the Magistrate believed the jury verdict to have been improper, he should have granted a new trial.

The Petitioner prays that this Court grant this Petition for Writ of Certiorari and consider summarily reversing the judgment of the Fourth Circuit and remanding for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I BARRETT W. FREEDLANDER, a member of the Bar of this Court, hereby certify that on the ___ day of September, 1986, three copies of the Petition for a Writ of Certiorari in the above-entitled case were mailed first class, postage prepaid to Dale A. Cooter, Esq., Cooter & Gell, 1333 H Street, N.W. Washington, D.C. 20005, counsel for the Respondent.

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APPENDIX A

United States Court of Appeals
For the Fourth Circuit

No. 85-1275

Julie D. Knowles,

Appellee,

versus

The Mutual Life Insurance Company of New York,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Clarence E. Goetz, Magistrate. (JH83-1134)

Argued: October 9, 1985 *Decided: April 23, 1986*

Before HALL and CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Barrett W. Freedlander (Niles, Barton & Wilmer on brief) for Appellant; Dale A. Cooter, (Linda G. Griffith (Cooter & Gell on brief) for Appellee.

PER CURIAM:

This action in the diversity jurisdiction was brought to collect the proceeds of a life insurance policy. By agreement, it was tried before a magistrate who submitted two special interrogatories to the jury. The jury answered the interrogatories, finding that the defendant's agent had apparent authority to accept a postdated check for the first premium but that the insured had not unconditionally accepted the insurance policy. Judgment for the defendant

would have followed upon the finding of conditional delivery, but after the discharge of the jury, the magistrate determined that the plaintiff had not been given notice of the conditional delivery defense and that the issue had been unfairly tried. He struck the jury's answer to that interrogatory and entered judgment for the plaintiff.

On the defendant's appeal, we affirm.

I.

On December 17, 1979 Charles Spell filed a written application for a $200,000 term life insurance policy with Mutual Life Insurance Company of New York and paid a premium of $53.39. A policy as applied for was issued but was not delivered, apparently because of Spell's uncertainty that he wanted it. MONY's agent, David Fleming, obtained a check with which to refund the $53.39 paid by Spell in December 1979, and, on the evening of May 28, 1980, he called his friend Spell to arrange to deliver the refund check. He found that Spell was still interested in taking out the insurance, and the two met at Spell's house. It turned out that Spell wanted the term insurance, but he also wanted the right to convert it to a whole life policy with premiums based on age 39. For that reason, he wanted the policy with its December 1979 date. Fleming told him that he would have such a conversion right, but Spell insisted that he wanted an official letter from MONY confirming his conversion right.

The conversation then turned to payment of the first premium of $373.73. Spell stated that he had only $282 in his bank account, but it was agreed that he would pay the initial premium by giving Fleming a check in that amount, endorsing MONY's refund check back to MONY, and paying the difference in cash.

As he was writing the check, Spell said that he would like to postdate it to June 7, the day after his next anticipated payday. According to Fleming, he responded "Do us both a favor and date it today." He explained that the check could not go through MONY's channels and be presented at Spell's bank until well after June 7. Again according to Fleming, Spell said that he wished to maintain a balance in his checking account to avoid a service charge, to which Fleming responded that he would pay the service charge if one was imposed on Spell. He said that Spell then said "O.K." and went back to writing the check.

The check was completed, postdated as of June 7, and placed by Spell upon a pillow between the two men.

Fleming delivered the insurance policy to Spell and then applied himself to the completion of a form to change the beneficiary from Spell's son to his fiancee, the plaintiff.

The check was accepted without comment by Fleming, though Fleming said he did not look at it and was unaware until later that it was postdated.

Actually Spell had less than $282 in his bank account on May 28. He had issued other postdated checks in anticipation of the June 6 deposit of his monthly salary.

Spell was fatally shot during the night of May 31-June 1.

II.

The defendant's defense that the insurance policy had not been accepted by Spell is based upon Spell's insistence that he have a letter confirming his conversion rights as explained to him by Fleming.

At a pre-trial conference, the defendant's defenses were said to be that a postdated, or worthless, check is not a premium payment, and that Spell knew that Fleming had no actual authority to accept such a check. Several days later, the magistrate received a letter from counsel for the defendant supplementing its proposed jury instructions and amending its request for special interrogatories to put before the jury its claim of conditional delivery.

At the opening of the second day of trial, after the close of evidence but before argument to the jury, the plaintiff objected to the conditional delivery defense, claimed surprise, and asked that the question not go to the jury. The magistrate, under the mistaken belief that the plaintiff's lawyer had received a copy of the letter requesting submission of the interrogatory under appropriate instructions, overruled the objection. At the hearing on the post-trial motion, the magistrate was correctly informed that the plaintiff's lawyer was unaware of the conditional delivery defense until after the opening of the trial. The magistrate then struck the jury's answer to the second interrogatory and, upon its finding that Fleming had apparent authority to accept a postdated check, entered judgment for the plaintiff.

Under these circumstances, we think the magistrate reasonably determined that the plaintiff was unfairly surprised by the assertion of the conditional acceptance defense at trial and that she had no reasonable opportunity to prepare to meet it. Having made that determination, it was well within his discretion to alter the judgment under Fed. R. Civ. P. 59(e).

The plaintiff's post-trial motion was for relief under Rule 60(b), but it had been made within ten days after the entry of judgment and was appropriately treated as a motion made under Rule 59(e). *Dove v. Codesco*, 569 F.2d 807, 809 (4th Cir. 1978).

III.

The question of Fleming's apparent authority to accept the postdated check in part payment of the first premium was submitted to the jury under proper instructions, and we must accept the jury's finding of apparent authority since there is an evidentiary basis for it.

Spell and Fleming were friends. Some years before, Spell had purchased a policy through Fleming when Fleming was representing another insurance company. Even if the jury accepted most of Fleming's version of the events of the evening of May 28, Fleming did not tell Spell that he had no authority to accept a postdated check; he asked that Spell not postdate the check as a "favor" to both. After the check was written and placed on the pillow for Fleming to pick up and examine, some time elapsed before Fleming's departure. The jury reasonably could have found that before delivering the insurance policy to Spell, Fleming would have examined the check and would have noticed the date, since the dating of the check had been a matter of active discussion. Finally, the jury might reasonably have believed that if Spell had known that Fleming had no authority to accept a postdated check and could not deliver the policy until the first premium had been fully paid, he would have made other arrangements for the payment of that premium and obtained effective delivery of the policy before his death on the night of May 31-June 1.

IV.

Before trial, MONY's principal defense seems to have rested upon the position that there had been no payment of the first premium during Spell's lifetime. This is based on two subsidiary contentions that delivery of a check that is worthless or postdated is not payment.

It is not now clear that the check was worthless. There were insufficient funds in Spell's bank account to cover it when it was issued and given to Fleming on May 28, but it could not have been presented before June 7. If Spell had lived and made a deposit of his salary check on June 6 in his accustomed manner, there is no indication that the check would not have been honored when presented on June 7 or later.

There is no doubt, however, that it was postdated. It was like a note, a promise to pay on or after June 7. We may thus accept MONY's premise that it should not be regarded as a present payment on May 28, or at any time during Spell's lifetime.

The magistrate refused to permit MONY to present that defense. He held that MONY was estopped to claim nonpayment by the recital in the policy of payment. He relied upon an old Maryland case, *Consolidated Real Estate & Fire Insurance Co. v. Cashow,* 41 Md. 59 (1874).

In *Consolidated,* an insurer of a building against loss by fire had reinsured half the risk. After loss of the building by fire, the reinsurer refused payment of its proportion of the loss upon the ground that its premium had not been paid before the loss. The Maryland Court of Appeals held that it was estopped to claim nonpayment because its policy of reinsurance contained a recital that the premium had been paid.

The case is a history one, but nothing in subsequent decisions in the Maryland Court of Appeals suggests that that court would not apply the same rule today. Nonpayment of the premium would not foreclose MONY's claim for the amount of the premium, but the recital in the policy does foreclose MONY's claim after Spell's death that the policy was never effective. Since Fleming's delivery of the policy to Spell was admittedly uncon-

ditional, the policy's recital of "the payment of premiums as provided" forecloses a claim of invalidity for nonpayment.

MONY argues that the "as provided" language in the recital refers to the "plain stipulation" that the premium be paid during Spell's lifetime. This, however, is simply the nonpayment argument that the *Consolidated* case prevents.

The defendant contends that Spell had defrauded Fleming and the defendant and that his fraud should except this case from the *Consolidated* rule. The claim of fraud is premised first upon the contention that Spell knew Fleming was unauthorized to accept a postdated check, but that contention is inconsistent with the jury's finding. If Spell reasonably believed that Fleming had the authority to accept a postdated check, his delivery of a postdated check to Fleming could not have been intended to defraud him. Spell's misrepresentation of the balance in his bank account on May 28 is simply irrelevant. The postdated check could not have been presented before June 7, and there is nothing to suggest that it would not have been good on that date if Spell had lived.

V.

Finally, the defendant objects to the award of prejudgment interest.

The policy, itself, provided for the payment of its face amount together with interest on the unpaid balance for up to two years. MONY contends that it should not be held liable for interest for a longer period than its contract required.

Maryland law, however, gives a trial judge the discretionary right to award prejudgment interest to place the injured party in a breach of contract case in the same

position she would have occupied had the defendant not broken its promise. Here, the defendant's wrongful refusal to pay deprived the plaintiff of the use of the insurance proceeds for more than the two years of MONY's contractual commitment. It was an appropriate situation for the magistrate to exercise his discretion as he did. *See I. W. Berman Properties v. Porter Brothers,* 276 Md. 1, 19-20, 344 A.2d 65, 75-77 (1975); *Brethren Mutual Insurance Co. v. Filsinger,* 54 Md. App. 357, 364-55, 458 A.2d 880, 884-85 (1983).

VI.

For the foregoing reasons, the judgment is affirmed.

AFFIRMED.

In The United States District Court
for the District of Maryland

Civil Action No. JH-83-1134

Julie D. Knowles

vs.

The Mutual Life Insurance Company of New York

MEMORANDUM

Plaintiff in the above-captioned case has moved for Judgment N.O.V. pursuant to Rule 50 of the Federal Rules of Civil Procedure; for relief from judgment under Rule 60(b); and for a new trial under Rule 59.

The case has been in the Court since April of 1983. At dispute is whether a policy of insurance in the amount of $200,000.00 on the life of Charles J. Spell, Sr. was in effect

at the time of Mr. Spell's death on May 31, 1980. The action is brought by the named beneficiary, Julie D. Knowles, against Mutual Life Insurance Company of New York (MONY), which company denies that the coverage was ever in force. Not in dispute are the facts that on May 28, 1980, an agent of MONY physically delivered to Mr. Spell the policy in exchange for a premium payment, part of which payment was made by a check post-dated to June 7, 1980.

After the filing of the complaint in this case (Paper No. 1), discovery proceeded forthwith, plaintiff having propounded interrogatories and defendant having answered by early August of 1983. Plaintiff's Interrogatories No. 2 and 3 read as follows:

> 2. State whether it is your position that MONY Policy No. 1097-22-84 NY, on the life of Charles J. Spell, Sr., was in full force and effect on the date of his death, May 31, 1980.
>
> 3. If your answer to Interrogatory No. 2 above was negative:
>
> a. State with specificity all facts providing a basis for this position.
>
> b. Identify any and all documents in your custody or control pertaining to the validity of the subject policy on May 31, 1980.
>
> c. Identify any and all persons who have knowledge of facts pertaining to the validity of the subject policy on May 31, 1980.

(Paper No. 7).

The answers to the above-cited interrogatories were as follows:

> *Answer to Interrogatory No. 2*
>
> It is the position of MONY that the aforesaid policy was not in full force and effect on May 31, 1983 [sic].

Answer to Interrogatory No. 3

a. 1. Mr. Spell did not have sufficient funds with which to pay the premium.

2. Mr. Spell dated the initial premium payment check, June 7, 1980.

3. Mr. Spell did not intend to pay his initial premium until June 7.

4. Defendant requires that premium checks be honored in order for insurance to be in effect, i.e. issued; it simply never was in effect.

b. There is no question that a valid policy was prepared, so it is not clear, what if any, documents the Plaintiff is seeking.

c. We incorporate the answer to paragraph 3b and having indicated a valid policy was prepared, the names of individuals having such knowledge would not be relevant even if they can be ascertained.

(Paper No. 9).

Early in September of 1983, plaintiff moved for summary judgment (Paper No. 12). Early in October of 1983, defendant answered (Paper No. 17) and filed its own motion for summary judgment supported by a memorandum of law (Paper No. 18). Plaintiff replied (Paper No. 21) and defendant replied to the reply with a memorandum of law (Paper No. 26). A hearing on the motions was held in December of 1983. Pursuant to the direction of the Court, plaintiff filed a supplementary memorandum of law in December of 1983 (Paper No. 29) and defendant submitted a supplementary memorandum of law (Paper No. 30) as well as a reply memorandum to plaintiff's supplemental memorandum (Paper No. 31) early in January of 1984. On January 13, 1984, the Court filed a Memorandum and Order in which plaintiff's motion for summary judgment was denied and defendant's

motion for summary judgment was granted in part and denied in part. Three days later, defendant submitted a motion for reconsideration, again supported by a memorandum of law (Paper No. 33) which was opposed by plaintiff (Paper No. 34). The Court affirmed its previous Memorandum and Order by another Memorandum and Order filed February 3, 1984 (Paper No. 35). The case subsequently was set for trial in June of 1984. Near the date of trial, research by the Court into jury instructions for the case disclosed case law previously uncited by either party, which case law appeared to be controlling and which would have the effect of substantially limiting the issues for trial. Both sides were apprised of the precedent discovered by the Court, trial was postponed and the parties were requested to brief the issue raised by the Court. Plaintiff filed a memorandum of law late in June of 1984 (Paper No. 40) as did defendant (Paper No. 41). This was followed by a reply memorandum from defendant in July of 1984 (Paper No. 42), from plaintiff early in August of 1984 (Paper No. 43) and then a "Final Memorandum" from defendant in September of 1984 (Paper No. 44). On September 26, 1984, the Court held a hearing at which oral arguments were presented and on October 5, 1984, the Court filed a Memorandum and Order in which the Court again denied motions for summary judgment and established that trial would be limited by pretrial order to the issue of the apparent authority of the MONY agent to deliver the policy in return for the payment he received, which issue would be submitted to the jury by way of special interrogatory as provided in Rule 49 (Paper No. 45). A pretrial conference was held December 18, 1984, at which time a pretrial order was agreed as amended (Paper No. 57) and defendant provided to the Court proposed jury instructions. There was no indication from the parties at the pretrial conference or in the agreed pretrial order that the defendant intended to establish at trial that no insurance contract existed because the decedent had

placed a condition upon acceptance of the contract, which condition was unfulfilled at the time of death. The pretrial order, in fact, stated:

> Defendant proposes to prove or to rely upon as a defense the fact that Charles Spell indicated his intent to pay for insurance on or after June 7, 1980 by providing David Fleming with a post-dated, worthless check.
>
> Charles Spell was on notice that David Fleming lacked authority, actual or apparent, to deliver the policy in question in return for a post-dated check. Despite this knowledge, Charles Spell post-dated the check constituting part payment.
>
> Legal theory: Neither a post-dated check nor a worthless check constitute payment of the initial premium.

(Paper No. 57, p. 3). Subsequent to the pretrial conference, however, defense counsel caused to be delivered to the Court a letter dated December 21, 1984, which stated:

> Following the deposition of yesterday and discussions with opposing counsel, we supplement our instructions with the enclosed.

Enclosed was Proposed Instruction No. 15 which reads:

> Conditional Delivery
>
> If you find that Charles Spell imposed a condition upon his acceptance of the insurance policy, namely, a letter from the Defendant stating that he could convert this policy to a whole life policy just as he could have done with his other policy with New York Life Insurance Company, and such letter had not been received by Mr. Spell at the time of his death, then you must find for the Defendant.

Also submitted to the Court by defendant was an amended request for special interrogatories, the amendment being the addition of No. 4 which reads:

> Did Charles Spell advise David Fleming that he would accept the insurance policy upon the condition that David Fleming obtain for him a letter from the Defendant relating to the conversion of this policy to a whole life policy?

The cover letter sent with the enclosures indicates a carbon copy to Linda G. Griffith, Esquire, plaintiff's co-counsel along with Dale Cooter, Esquire. Beneath the notation of a carbon copy to Ms. Griffith is the notation "Enclosures." The Court garnered the impression from this letter:

1) That some fact had come to light at a deposition December 20, 1984, following the pretrial conference which gave rise to the defense posited in the jury instruction and special interrogatory set forth above.

2) That counsel had discussed the matter between them.

3) That a copy of defense counsel's letter to the Court and the enclosures therein had been sent to plaintiff's counsel contemporaneous with its delivery to the Court.

This impression of the Court was reinforced in chambers before trial on the opening day of the trial when the Court made reference to two issues going before the jury and no objection was heard. At the opening of the second day of trial, after the close of evidence but before argument to and instruction of the jury, plaintiff's counsel objected strenuously to the late entry of the conditional acceptance defense, claimed unfair surprise and urged that the question not go to the jury. Mr. Cooter told the Court that he had heard mention of conditional acceptance for the first time in this case in chambers prior to trial on the previous day and assumed at that time that it had to do in some way with the post-dated check. Instead, claimed Mr. Cooter, defense counsel had put forth in his opening

statement the claim that the acceptance of the policy by Mr. Spell was conditioned upon the receipt of a letter from the insurance company assuring that the term policy was convertible to whole life and that, as the letter was never received by Mr. Spell, the condition was not fulfilled and there was no acceptance by him of the policy. Mr. Cooter told the Court that his initial reaction to the argument was that somehow he had missed a vital point in the pleadings. He said, however, that a review of the case file after the first day of trial failed to reveal any prior mention of the new legal theory being espoused by the defense. Consequently, he asked the Court to strike all evidence relative to conditional acceptance and instruct the jury that the issue was not to be considered by them.

In reply, defense counsel made the following statement:

> This is a theory that came to me while I was preparing for this case subsequent to the answers to interrogatories — even subsequent to the pretrial . . . In preparation for the case — at the last moment, almost . . . I uh . . . that theory came to me and as you may recall I actually submitted this instruction after I submitted the other instructions because that's how late it came to me. . . .
>
> I received no new information which would require supplementation of responses. If you look at Rule 26(e) — and which we did, we studied it and anticipated this — we felt that it was absolutely not covered.

The Court then asked defense counsel why he had not sought amendment of the pretrial order, to which defense counsel replied:

> Well, looked at the pretrial order and thought that it was covered under the general feeling Mr. Spell's intent . . . what was his intent with respect to this particular insurance.

The Court was of the opinion at that time that it was rather late in the proceedings for plaintiff to be raising the objection which it had raised, in light of the Court's belief that plaintiff's counsel, or one of them, had received the proposed jury instruction and special interrogatory nearly three weeks before trial and should have been aware of the issue generated by them. The Court thought it possible, and even likely, that there had been a failure of communication between plaintiff's co-counsel. Moreover, the Court had intended to and did submit the case to the jury by way of special interrogatories and the Court realized that if the jury were to find for the defendant on the first question as to lack of apparent authority or for plaintiff on both questions, then plaintiff's claim of surprise would be moot. The Court denied plaintiff's motion to strike the evidence as to conditional acceptance and remove the issue from consideration of the jury and advised plaintiff's counsel that if, in fact, the jury found for defendant solely on the issue of conditional acceptance the Court would entertain a motion for Judgment N.O.V. The special interrogatories to the jury were:

1. Based on the evidence in this case did David Fleming have apparent authority to deliver the policy in question in this case to Charles Spell on May 28, 1980 in return for a postdated check?

2. Did Charles Spell place a condition upon his acceptance of the policy that he receive a letter from the company authorizing him to convert the policy to whole life?

(Paper No. 64). The jury found for plaintiff as to Question No. 1 and for defendant as to Question No. 2, and, therefore, found for defendant solely on the issue of conditional acceptance.

On February 5, 1985, the Court held a hearing on post-trial motions filed by plaintiff's counsel. The pleadings pursuant to those motions, particularly the incorrect

contention of plaintiff's counsel that the Court had been in receipt of the proposed instruction on conditional acceptance since the day of the pretrial conference, raised in the mind of the Court the serious doubt as to whether plaintiff's counsel had been in receipt of the letter of December 21, 1984 and its enclosures. At the hearing on post-trial motions, defense counsel informed the Court that its impressions had been wrong — on all counts:

1) The evidence supporting the legal theory advanced by the defense as to conditional acceptance was not uncovered at the deposition December 20, 1984.

2) There was no discussion prior to trial between opposing counsel as to the defense of conditional acceptance raised by defendant.

3) Plaintiff's counsel was not sent copies of the enclosures in the letter of December 21, 1984. It appears, in fact, that plaintiff's counsel had never seen those documents and was unaware of their nature until the February 5 hearing.

The Court finds it unnecessary to determine whether the misimpression was a creature of design or inadvertence. It is sufficient to state that the Court was misled by defense counsel's letter as would have been any person of reason. Had the Court been raced with a pretrial objection to the eleventh hour interposition of the conditional acceptance defense, the objection likely would have been sustained and special interrogatory No. 2 would not have been before the jury. The basis of that decision would have been the recognition of this Court of the importance of the integrity of the discovery process and the pretrial order. The Federal Rules were not drafted with caprice or in a vacuum. Rather, they are the embodiment of the intent of the federal judicial system that the proceedings therein be open and aboveboard, with

the hope that such openness will produce judicial economy and substantial justice. Surprise is alien to the process. Unnecessary surprise is unacceptable. Planned surprise is an abomination. In this case, experienced trial counsel for defense, as revealed by his own statement in court, considered whether this admittedly new legal theory had to be revealed to plaintiff either through supplementation of answers to interrogatories or amendment of the pretrial order. He made the studied decision that he could get by without either. His decision represents an affront to the rules of the court and to the dignity of its trial processes. It is clearly within the discretion of this Court to hold a litigant estopped by its litigation conduct to have an issue considered by a trier of fact and this is particularly so when a party has failed to identify an issue for inclusion in the pretrial order when under a clear duty to do so. *Matter of Intercontinental Properties Management*, 604 F.2d 254 (4th Cir. 1979).

Federal Rule 8(f) provides that all pleadings shall be so construed as to do substantial justice. Plaintiff has submitted timely motions under both Rules 59 and 60. Although plaintiff has not sought specifically the relief provided by Rule 59(e), it has been recognized that there is substantial overlap between Rule 59(e) and Rule 60(b), with one signficant distinction being that Rule 59 motions must be filed no later than ten days after the entry of judgment. Judgment was entered in this case January 11, 1985 (Paper No. 66) and plaintiff's motions were filed January 16, 1985 (Paper No. 67). Consequently, the Court is going to read plaintiff's motion for relief under Rule 60(b) as a motion for relief under Rule 59(e). *Bank of California v. Arthur Andersen & Co.*, 709 F.2d 1174 (7th Cir. 1983). The Court mistakenly thought that plaintiff was or should have been aware of the conditional acceptance defense interposed by defendant and that plaintiff should have but failed to object before trial. This

mistake of fact led the Court to submit the issue of conditional acceptance to the jury which would not have been done otherwise. Under the Federal Rules the trial court is possessed of the authority to alter or vacate judgment if, in the exercise of its broad discretionary powers, the Court finds such action to be necessary in order to accomplish justice. *Harman v. Pauley,* 678 F.2d 479 (4th Cir. 1982); *McCarthy v. Manson,* 714 F.2d 234 (2d Cir. 1983). Pursuant to Rule 59(e), this Court will enter an Order separately altering the judgment to that which would have been rendered had the issue of conditional acceptance not been before the jury. Judgment, then, will be for plaintiff in the amount of $200,000.00 plus the rate of interest set forth in the contract for the period covered by the contract and at the legal rate of interest in Maryland thereafter.

CLARENCE E. GOETZ,
United States Magistrate.

Dated February 14, 1985

In The United States District Court
for the District of Maryland

Civil Action No. JH-83-1134

Julie D. Knowles

vs.

The Mutual Life Insurance Company of New York

ORDER

In accordance with the foregoing Memorandum, IT IS, this 14th day of February, 1985, by the United States District Court for the District of Maryland, ORDERED:

1 That judgment be entered in favor of the plaintiff in the amount of $200,000.00 plus costs and interest at the rate provided by the policy for the period provided in the policy and at the legal rate thereafter.

2. That this altered judgment shall serve in place and instead of the judgment entered herein on the 11th day of January, 1985.

3. That the Clerk mail copies of the judgment and this Memorandum and Order to counsel for the parties.

CLARENCE E. GOETZ,
United States Magistrate.

MONY CORPORATE ORGANIZATION CHART

THE MUTUAL INSURANCE COMPANY OF NEW YORK

MONY LIFE INSURANCE COMPANY OF AMERICA

MONY LEGACY LIFE INSURANCE COMPANY

MONYCO, INC.

MONY LIFE INSURANCE COMPANY OF CANADA

MONY PENSION INSURANCE CORPORATION

MONY SERIES FUNDS, INC.

MONY PREFERRED HEALTH, INC.

MONY GENERAL PPO, INC.

MONY SECURITIES CORP.

MONY ADVISERS, INC.

MONY CREDIT CORPORATION

MONY REINSURANCE CORPORATION

1740 VENTURES, INC.

KELLY & ASSOCIATES, INC.

MONY REALTY MANAGEMENT, INC.

MONY REALTY PARTNERS, INC.

MONY FINANCIAL PLANNING, INC.

UNIFIED MANAGEMENT CORPORATION

MONY AGRICULTURAL FINANCIAL SERVICES, INC.

BELL INVESTMENT ACQUISITION CORPORATION

DUFF FARM MANAGEMENT SERVICE, INC.

MONY-RE GROUP, INC.

MONY-RE MANAGEMENT, INC.

EVALUATION ASSOCIATES, INCORPORATED

EAI RESOURCE INVESTMENTS, INC.

THE KEEP, INC.

EVALUATION ASSOCIATES INVESTMENT MANAGEMENT COMPANY

MONY-ROCKVILLE/GP, INC.

MONY BLOOMFIELD HILLS, INC.